Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 2)

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO 45–48 OF 1998 AND 45–49 OF 1998
AUGUSTINE PAUL J
12 APRIL 1999

Criminal Procedure *— Prosecution — Statute under which accused charged pending annulment — Whether invidious and oppressive to maintain such prosecution — Inherent power of the High Court to protect its process from abuse, when exercised*

Statutory Interpretation *— Construction of statutes — Savings clause — Saving provision under art 150(3) of the Federal Constitution, construction of — Whether applies to prosecutions — Whether displaces s 30 of the Interpretation Act 1967 — Federal Constitution art 150(3) — Interpretation Act 1967 s 30*

The accused — the former Deputy Prime Minister — had four charges preferred against him under s 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970 ('the Ordinance'). When the charges were called up for hearing on 2 November 1998 in the High Court, the defence raised a preliminary objection. In arguing the objection, counsel for the defence made the following submissions: (i) the Dewan Rakyat had on the 23 October 1998 passed a resolution to repeal the Ordinance retrospectively from 8 January 1998. Counsel added that although the Ordinance was yet to be annulled by the Dewan Negara, the intention of the government was to have the Ordinance annulled in accordance with art 150(3) of the Federal Constitution with effect from 8 January 1998. Thus, the offences with which the accused was charged with would no longer exist with effect from 8 January 1998 once the resolution in the Dewan Negara was passed; (ii) pending the passing of the resolution in the Dewan Negara, it would be invidious and oppressive to continue to subject the accused to a prosecution in respect of the four charges under the Ordinance; and (iii) the saving provision in art 150 of the Constitution did not preserve offences under the Ordinance upon its annulment and neither could s 30 of the Interpretation Act 1967 ('s 30').

The learned senior deputy public prosecutor in reply submitted that: (i) the Ordinance had not been annulled as prescribed by art 150(3) of the Constitution since the required resolution by the Dewan Negara had not been passed yet, with the result that the Ordinance was still in force; (ii) in any event, s 30 of the Interpretation Act 1967 applied, as an annulment referred to in art 150(3) of the Constitution must be treated as a repealing law; and (iii) a prosecution for an offence under a repealed Act could be commenced and a conviction had even been entered after its repeal.

In considering the submissions, the court had to, inter alia, determine the following issues: (i) whether legal proceedings can be

continued or initiated after a temporary statute has expired; (ii) whether the annulment of a statute amounted to a repeal of it; and (iii) whether the saving provision contained in art 150(3) of the Federal Constitution excluded the application of s 30 to it.

Held, dismissing the preliminary objection:

(1) As the required resolution had not been passed by the Dewan Negara, the Ordinance was still in force with the result that any prosecution based on it would be good in law. In any event, the prosecution in this case was instituted before the resolution was even passed in the Dewan Rakyat and this fact further weakened the argument by the defence (see p 257C–D).

(2) As the prosecution had been validly instituted by the Public Prosecutor as authorized by art 145(3) of the Constitution whilst the Ordinance was in force, it could not be said that the accused had been subjected to any injustice. Thus, the prosecution of the accused does not amount to oppression and an abuse of process and accordingly the court cannot direct that the prosecution must not proceed. In any event, the accused failed to make a formal application as was required (see pp 257G–258G).

(3) As a time period had been prescribed for the expiry of the Ordinance, the Ordinance was a temporary legislation. In common law, s 30 which was limited in its operation to repeals, had no application when a temporary statute expired. However, by virtue of s 32 of the Interpretation Act 1967, s 30 would apply to a statute which had expired. Hence, s 30 applied to the Ordinance when it expired as prescribed. Where a statute expires or ceases to have effect before its expiry date, s 30 would continue to apply (see pp 259C–260F).

(4) The annulment of a statute is the repeal of it. On the facts, the required resolutions passed by both Houses of Parliament to annul the Ordinance as provided by art 150(3) of the Constitution would therefore constitute the repealing law for the purposes of s 30. Section 30 would continue to apply to the Ordinance once it was effectively annulled (see p 261C-D).

[Bahasa Malaysia summary

Empat pertuduhan telah dihadapkan terhadap tertuduh — bekas Timbalan Perdana Menteri — di bawah Ordinan Darurat (Kuasa-Kuasa Perlu) No 22 tahun 1970 ('Ordinan tersebut"). Apabila pertuduhan-pertuduhan tersebut telah dipanggil untuk pembicaraan pada 2 November 1998 di Mahkamah Tinggi, pihak pembelaan telah mengemukakan bantahan permulaan. Dalam menghujah bantahan tersebut, peguam pembela membuat penghujahan berikut: (i) Dewan Rakyat telah pada 23 Oktober 1998, membuat ketetapan untuk memansuhkan Ordinan tersebut yang berkuatkuasa kebelakangan

dari 8 Januari 1998. Dia menambah bahawa walaupun Ordinan tersebut masih belum dibatalkan oleh Dewan Negara, niat kerajaan adalah untuk membatalkan Ordinan tersebut menurut perkara 150(3) Perlembagaan Persekutuan mulai dari 8 Januari 1998. Oleh itu, kesalahan yang tertuduh telah dipertuduhkan tidak akan wujud dari 8 Januari 1998 apabila ketetapan di Dewan Negara diluluskan; (ii) sementara menunggu kelulusan ketetapan di Dewan Negara, adalah menyakit hati dan menindas untuk terus mendakwa tertuduh dengan keempat tuduhan di bawah Ordinan tersebut; (iii) peruntukan kecualian (saving provision) di bawah perkara 150 Perlembagaan tidak mengekalkan kesalahan di bawah Ordinan tersebut apabila pembatalannya berkuatkuasa, dan s 30 Akta Tafsiran 1967 ('s 30') juga tidak boleh berbuat demikian.

Penolong pendakwa raya kanan dalam jawapannya berhujah bahawa: (i) Ordinan tersebut masih belum dibatalkan sepertimana diperuntukkan oleh perkara 150(3) Perlembagaan oleh kerana ketetapan yang dikehendaki oleh Dewan Negara masih belum diluluskan, yang bermakna Ordinan tersebut masih berkuatkuasa; (ii) apa sekalipun, s 30 Akta Tafsiran 1967 terpakai, kerana sesuatu pembatalan yang dirujuk dalam perkara 150(3) Perlembagaan mestilah disifatkan sebagai sebuah akta pemansuhan; dan (iii) pendakwaan sesuatu kesalahan di bawah sesuatu akta yang dimansuhkan boleh dimulakan malah sabitan pernah dimasukkan selepas pemansuhannya.

Dalam mempertimbangkan hujahan-hujahan mahkamah terpaksa, antara lainnya menentukan isu-isu berikut: (i) sama ada prosiding undang-undang boleh diteruskan atau dimulakan selepas statut sementara telah luput; (ii) sama ada pemansuhan sesuatu statut bererti bahawa ia telah dibatalkan; (iii) sama ada peruntukan kecualian yang terkandung di dalam perkara 150(3) Perlembagaan Persekutuan mengecualikan pemakaian s 30 kepadanya.

Diputuskan, menolak bantahan permulaan:

(1) Oleh kerana ketetapan yang diperlukan masih belum diluluskan oleh Dewan Negara, Ordinan tersebut masih berkuatkuasa dengan akibat bahawa apa-apa pendakwaan yang berasaskan padanya adalah betul di sisi undang-undang. Apa sekalipun, pendakwaan dalam kes ini telah dimulakan sebelum ketetapan tersebut diluluskan di Dewan Rakyat dan fakta ini selanjutnya melemahkan hujahan pembelaan (lihat ms 257C–D).

(2) Oleh kerana pendakwan telah dimulakan dengan sahnya oleh Pendakwa Raya sepertimana diberikuasa di bawah perkara 145(3) Perlembagaan sewaktu Ordinan tersebut berkuatkuasa, tidak boleh dikatakan bahawa tertuduh menerima ketidakadilan. Justeru itu, pendakwaan tertuduh bukanlah suatu penindasan dan penyalahgunaan proses dan dengan itu, mahkamah tidak boleh mengarahkan bahawa pendakwaan tidak diteruskan. Apa

sekalipun, tertuduh gagal untuk membuat permohonan rasmi seperti yang dikehendaki (lihat ms 257G–258G).

(3) Oleh kerana suatu jangkamasa telah ditetapkan untuk peluputan Ordinan tersebut, Ordinan tersebut adalah perundangan sementara. Mengikut *common law*, s 30 yang adalah terhad dalam operasinya kepada pemansuhan, tidak terpakai apabila suatu statut sementara luput. Akan tetapi, menurut s 32 Akta Tafsiran 1967, s 30 akan terpakai terhadap statut yang telah luput. Dengan itu, s 30 terpakai kepada Ordinan tersebut apabila ia luput seperti diperuntukkan. Di mana sesuatu statut luput ataupun berhenti berkuatkuasa sebelum tarikh luputnya, s 30 akan terus terpakai (lihat ms 259C–260F).

(4) Pembatalan sesuatu statut adalah pemansuhannya. Atas fakta, ketetapan yang diperlukan yang diluluskan oleh kedua-dua Dewan Parlimen untuk membatalkan Ordinan tersebut seperti yang diperuntukkan oleh perkara 150(3) Perlembagaan merupakan perundangan pembatalan mengikut tujuan s 30. Seksyen 30 akan terus terpakai kepada Ordinan tersebut apabila ia telah diluputkan (lihat ms 261C–D).]

Notes

For cases on prosecution generally, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2005–2047.

For a case on the construction of a saving clause, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) para 2567.

Cases referred to

Basant Singh v Rampal Singh AIR 1919 Oudh 217 (refd)
Connelly v Director of Public Prosecutions [1964] AC 1254 (refd)
David M'Cowan v Baine [1891] AC 401 (refd)
Director of Public Prosecutors v Humphrys [1977] AC 1 (refd)
Duport Steels Ltd v Sirs [1980] 1 All ER 529 (refd)
Gopichand v Delhi Administration AIR 1959 SC 609 (refd)
Hebbert v Purchas (1871) LR 3 PC 605 (refd)
Hui Chi-ming v The Queen [1992] 1 AC 34 (refd)
Jotindranath v Province of Bihar AIR 1949 FC 175 (refd)
Karpal Singh & Anor v PP [1991] 2 MLJ 544 (refd)
Prince Blucher, Re (1930) 47 TLR 19 (refd)
PP v Low Ah Sang [1962] MLJ 13 (refd)
R v Wicks [1946] 2 All ER 529 (refd)
Ram Prasad v State of Punjab AIR 1966 SC 1607 (refd)
State of Orissa v Bhupendra Kumar AIR 1962 SC 945 (refd)
State of Punjab v Mohar Singh AIR 1955 SC 84 (refd)
State of UP v Jagmanderdas AIR 1954 SC 683 (refd)
Warburton v Loveland (1832) 5 ER 499 (refd)
Wicks v Director of Public Prosecutions [1947] AC 362; [1947] 1 All ER 205 (refd)

Legislation referred to

Anti-Corruption Act 1997
Criminal Procedure Code (FMS Cap 6) s 376
Emergency (Essential Powers) Ordinance No 22 of 1970 s 2(1)
Federal Constitution arts 145(3), 150(1), (2B), (3), (7), 160(1)
Interpretation Act 1948 s 3
Interpretation Act 1967 ss 3, 30(1), 32
Interpretation Act 1978 s 16(1), (2) [UK]

Abdul Gani Patail (*Azahar bin Mohamed, Mohd Yusof bin Haji Zainal Abidin, Stanley C Augustin, Nordin Hassan* and *Shamsul bin Haji Sulaiman* with him) (*Attorney General's Chambers*) for the prosecution.

Raja Aziz Addruse (*Haji Sulaiman Abdullah, Christopher Fernando, Gurbachan Singh Pannu, Zainur Zakaria, Pawancheek Merican, Kamar Ainiah Kamaruzaman, Sankara N Nair, Zulkifli Nordin* and *Robyn Choi* with him) (*Raja Aziz Addruse*) for the accused.

Augustine Paul J: Dato' Seri Anwar bin Ibrahim ('the accused') had four charges preferred against him under s 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970 ('Ordinance No 22'). They read as follows:

First Charge

That you, between 12 August 1997 and 18 August 1997 at the Official Residence of the Deputy Prime Minister, No 47, Damansara Road, in the Federal Territory of Kuala Lumpur, while being a Member of the administration, to wit, holding the post of Deputy Prime Minister and Minister of Finance committed corrupt practice whereby you had:

> directed Dato Mohd Said bin Awang, Special Branch Director and Amir bin Junus, Special Branch Deputy Director II, Royal Malaysian Police to obtain a written admission from Azizan bin Abu Bakar to deny sexual misconduct and sodomy committed by you for the purpose of protecting yourself against any criminal action or proceedings, and as a result of which Azizan bin Abu Bakar had thereby made a written admission dated 18 August 1997 to the Prime Minister as directed,

and you have thereby committed an offence punishable under s 2(1), Emergency (Essential Powers) Ordinance No 22/1970.

Second Charge

That you, on or about 27 August 1997, at the Official Residence of the Deputy Prime Minister, No 47, Damansara Road, in the Federal Territory of Kuala Lumpur, while being a member of the administration, to wit, holding the post of Deputy Prime Minister and Minister of Finance committed corrupt practice whereby you had:

> directed Dato Mohd Said bin Awang, Special Branch Director and Amir bin Junus, Special Branch Deputy Director II, Royal Malaysian Police to urge Azizan bin Abu Bakar to give a written public statement for the purpose of protecting yourself against any criminal action or proceedings and as a result of which Azizan bin Abu Bakar had thereby given a written public statement as directed,

and you have thereby committed an offence punishable under s 2(1), Emergency (Essential Powers) Ordinance No 22/1970. A

Third Charge

That you, between 12 August 1997 and 18 August 1997, at the Official Residence of the Deputy Prime Minister, No 47, Damansara Road, in the Federal Territory of Kuala Lumpur, while being a Member of the B administration, to wit, holding the post of Deputy Prime Minister and Minister of Finance committed corrupt practice whereby you had:

directed Dato Mohd Said bin Awang, Special Branch Director and Amir bin Junus, Special Branch Deputy Director II, Royal Malaysian Police to obtain a written admission from Ummi Hafilda bte Ali to deny sexual misconduct and sodomy committed by you for the purpose of protecting C yourself against any criminal action or proceedings, and as a result of which Ummi Hafilda bte Ali had thereby made a written admission dated 18 August 1997 to the Prime Minister as directed,

and you have thereby committed an offence punishable under s 2(1), Emergency (Essential Powers) Ordinance No 22/1970.

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Fourth Charge

That you, on or about 27 August 1997, at the Official Residence of the Deputy Prime Minister, No 47, Damansara Road, in the Federal Territory of Kuala Lumpur, while being a Member of the administration, to wit, holding the post of Deputy Prime Minister and Minister of Finance committed corrupt practice whereby you had: E

directed Dato Mohd Said bin Awang, Special Branch Director and Amir bin Junus, Special Branch Deputy Director II, Royal Malaysian Police to urge Ummi Hafilda bte Ali to give a written public statement to deny sexual misconduct and sodomy committed by you for the purpose of protecting yourself against any criminal action or proceedings and as a result of which Ummi Hafilda bte Ali had thereby given a written public F statement dated 29 August 1997 as directed,

and you have thereby committed an offence punishable under s 2(1), Emergency (Essential Powers) Ordinance No 22/1970.

The accused was charged with these four charges in the Sessions Court at Kuala Lumpur on 29 September 1998. Upon an application made by the G Public Prosecutor, the charges were transferred to the High Court for hearing and were mentioned before me on 5 October 1998 when they were fixed for hearing on 2 November 1998. When the case was called up for hearing on that day, the defence raised a preliminary objection.

Raja Aziz Addruse, leading counsel for the defence, in arguing the H objection raised said that the four charges against the accused are under s 2(1) of Ordinance No 22. He said that this Ordinance was promulgated pursuant to art 150(1) and (2B) of the Federal Constitution ('the Constitution') arising from the Proclamation of Emergency in 1969. He then referred to art 150(3) of the Constitution which deals with the manner in which such an ordinance may cease to have effect. The clause reads: I

A Proclamation of Emergency and any Ordinance promulgated under Clause (2B) shall be laid before both Houses of Parliament, and, if not sooner

A revoked shall cease to have effect if resolutions are passed by both Houses annulling such Proclamation or Ordinance, but without prejudice to anything previously done by virtue thereof or to the power of the Yang di-Pertuan Agong to issue a new Proclamation under Clause (1) or promulgate any Ordinance under Clause (2B).

B He referred to a report appearing in the *New Straits Times* dated 23 October 1998 to the effect that the Dewan Rakyat had on the previous day passed a resolution to 'repeal' Ordinance No 22 retrospectively with effect from 8 January 1998 following the enforcement of the Anti-Corruption Act 1997 this year. With regard to this resolution, he referred to a report from the Hansard on the statement by the Minister who moved the motion in the C Dewan Rakyat. The material part of the report reads as follows:

> ... sekarang saya kemukakan masalah bagi diputuskan. Masalah ialah bahawa usul di atas nama Yang Amat Berhormat Perdana Menteri iaitu bahawa Majlis ini membuat ketetapan mengikut fasal 3 perkara 150 Perlembagaan Persekutuan Ordinance 22 (Kuasa-Kuasa Perlu) Darurat 1970 hendaklah disifatkan telah menjadi batal pada 8 Januari 1998, iaitu tarikh Akta D Pencegahan Rasuah 1997 mula berkuatkuasa dipersetujukan. Usul dikemukakan bagi diputuskan dan disetujukan.

He added that although Ordinance No 22 is yet to be annulled by the Dewan Negara, the intention of the Government, as expressed in the statement of the Minister who moved the motion in the Dewan Rakyat, is E to have the ordinance annulled in accordance with art 150(3) of the Constitution with effect from 8 January 1998. He said that as the intention of the Government is to annul Ordinance No 22, the offences with which the accused has now been charged with will no longer have existed with effect from 8 January 1998 once the resolution in the Dewan Negara is passed. He added that pending the passing of the resolution in the Dewan F Negara, it will be invidious and oppressive to continue to subject the accused to a prosecution in respect of the four charges under Ordinance No 22. In support of this argument, he referred to *Hui Chi-ming v The Queen* [1992] 1 AC 34 where Lord Lowry said (at p 54):

> G The doctrine of abuse of process and the remedy of refusal to allow a trial to proceed are well established. As Lord Reid said in *Connelly v Director Public Prosecutions* [1964] AC 1243 at p 1296, there must always be a residual discretion to prevent anything which savours of abuse of process. The main modern authorities are *Connelly v Director of Public Prosecutions* and *Reg v Humphrys* [1977] AC 1 and their Lordships refer to those cases for statements of principle.

H He said that pending the full annulment of Ordinance No 22, the trial in respect of the four charges should be stayed.

Learned counsel further submitted that the saving provision contained in art 150(3) of the Constitution does not preserve offences under I Ordinance No 22 upon its annulment as they do not fall within the scope of the provision which reads as follows:

> ... but without prejudice to anything previously done by virtue thereof ... .

He started off this line of argument by referring to s 30(1) of the Interpretation Act 1967 ('s 30') which reads as follows:

> The repeal of a written law in whole or in part shall not —
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> (a) affect the previous operation of the repealed law or anything duly done or suffered thereunder; or
>
> (b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law; or
>
> (c) affect any penalty, forfeiture, or punishment incurred in respect of any offence committed under the repealed law; or
>
> (d) affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment,
>
> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing law had not been made.

He said that s 30 cannot be invoked to preserve any of the matters specified therein in Ordinance No 22 following its annulment for two reasons. Firstly, the use of the words '... as if the repealing law had not been made' in s 30 means that it is concerned with the repeal of one legislation by another. There is no repealing law in the case of the annulment of Ordinance No 22 as it is annulled by the resolution of both Houses of Parliament. He said that the words from s 30 that I have emphasized are clear and must be so construed. In support of this view that where the language of an Act is clear and explicit, the court must give effect to it, learned counsel referred to cases such as *Re Prince Blucher* (1930) 47 TLR 19; *Warburton v Loveland* (1832) 5 ER 499; *David M'Cowan v Baine* [1891] AC 401 and *Duport Steels Ltd v Sirs* [1980] 1 All ER 529. He concluded by saying that as there is no repealing law in the annulment of Ordinance No 22, s 30 does not apply. Secondly, as art 150(3) of the Constitution has its own saving provision, any matter that is saved from the annulment must be determined by the words used in the provision. Learned counsel referred to some dictionaries to show that the phrase 'by virtue of' in the saving provision means 'on the strength of' or 'through the force of law'. He said that this meaning makes it plain that the commission of an offence does not come within the saving provision as no offence can be committed 'by virtue of' Ordinance No 22 with the result that offences committed under Ordinance No 22 are not saved by its annulment.

In his reply, Dato' Abdul Gani Patail said that Ordinance No 22 has not been annulled as prescribed by art 150(3) of the Constitution since the required resolution by the Dewan Negara has not been passed yet with the result that it is still in force. In any event, he said, s 30 applies as an annulment referred to in art 150(3) of the Constitution and must be treated as a repealing law. In support of this argument, he referred to some dictionaries to argue that 'repeal' has the same meaning and effect as 'annul'. He said that this would mean that s 30 becomes applicable upon the annulment of Ordinance No 22. He then referred to s 32 of the Interpretation Acts 1948 and 1967 ('s 32') to show that s 30 also applies

upon the expiry of a statute. He also said that the words '... anything previously done by virtue thereof ...' in the saving provision in art 150(3) of the Constitution carries the same meaning as 'anything done under it' and therefore includes an offence committed under it. He then referred to *PP v Low Ah Sang* [1962] MLJ 13 and *Wicks v Director of Public Prosecutions* [1947] AC 362 to contend that a prosecution for an offence under a repealed Act can be commenced and a conviction had even been entered after its repeal.

I gave anxious consideration to the submission of both parties. My primary view is that the objection raised by the defence arises for consideration only if Ordinance No 22 has been annulled by a resolution passed by both Houses of Parliament as prescribed by art 150(3) of the Constitution. It is only then that Ordinance No 22 will cease to have any effect. Until then it will continue to be in force. It follows that as the required resolution has not been passed by the Dewan Negara yet, Ordinance No 22 is still in force with the result that any prosecution based on it is good in law. I also pause to add that in this case the prosecution was instituted before the resolution was even passed in the Dewan Rakyat. This further weakens the argument advanced by the defence. With regard to the objection of abuse of process raised by the defence, I refer to the judgment of the (then) Supreme Court in *Karpal Singh & Anor v PP* [1991] 2 MLJ 544 where Abdul Hamid Omar LP in writing for the court reviewed *Connally v Director of Public Prosecutions* [1964] AC 1254 and *Director of Public Prosecutions v Humphrys* [1977] AC 1 and said that this inherent power may be exercised by the High Court only in rare instances where it is right to do justice to the accused. In relation to the procedure to be followed for the exercise of the power, his Lordship said (at p 548):

> Generally, the procedure would appear to be that the accused should apply by motion to a High Court to quash the indictment and he then has to prove either on the face of the indictment or by an affidavit that the charge has been preferred without jurisdiction or has a substantial and apparent defect. We are not aware of any court acting merely on the oral statement of a counsel.

As the prosecution has been validly instituted by the Public Prosecutor as authorized by art 145(3) of the Constitution when Ordinance No 22 is still in force, it cannot be said that the accused has been subjected to any injustice. In the premises, I held that the prosecution of the accused does not amount to oppression and an abuse of process. Accordingly, the court cannot direct that the prosecution must not proceed. In this regard, I refer to *Connelly v Director of Public Prosecutions* [1964] AC 1254 where Lord Morris of Borth-y-Gest said (at pp 1300–1301):

> I consider that if a charge is preferred which is contained in a perfectly valid indictment which is drawn so as to accord with what the court has stated to be correct practice and which is presented to a court clothed with jurisdiction to deal with it and if there is no plea in bar which can be upheld, the court cannot direct that the prosecution must not proceed. I agree with what was said by Lord Goddard CJ in *Reg v Chairman, County of London Quarter Session, ex p Downes* [1954] 1 QB 1 that once an indictment is before the court, the accused must be arraigned and tried thereon unless (on a motion to quash or

demurrer pleaded) the indictment is held to be defective in substance or form and is not amended, or unless matter in bar is pleaded and the plea is tried and confirmed in favour of the accused or unless (after the indictment is found) the Attorney General enters a nolle prosequi or unless the court has no jurisdiction to try the offence disclosed by the indictment. In that case, Lord Goddard said that he knew of no power in the court to quash an indictment because it is anticipated that the evidence would not support the charge: indeed, the only ground on which the court can examine the deposition, before arraignment, is to see whether (in a case where there is a count for which there has not been a committal) the depositions disclose the offence covered by that count.

There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuse of its process and to defeat any attempted thwarting of its process. The preferment in this case of the second indictment could not, however, in my view, be characterized as an abuse of the process in the court.

And in *Director of Public Prosecutions v Humphrys* [1977] AC 1, Viscount Dilhorne said at p 24:

> Where an indictment has been properly preferred in accordance with the provisions of that Act [Administration of Justice (Miscellaneous Provision) Act 1933], has a judge power to quash it and to decline to allow the trial to proceed merely because he thinks that a prosecution of the accused for that offence should not have been instituted? I think there is no such general power and that to recognize the existence of such a degree of omnipotence is, as my noble and learned friend Lord Edmund-Davies has said, unacceptable in any country acknowledging the rule of law. But saying this does not mean that there is not a general power to control the procedure of a court so as to avoid unfairness.

In any event, the accused has failed to make an application as advised by the (then) Supreme Court in *Karpal Singh & Anor v PP* [1991] 2 MLJ 544.

Be that as it may, and notwithstanding the procedural defect in the application presented by the defence, it stands to be rejected the moment it is made if the annulment of Ordinance No 22 activates s 30 which is applicable to the interpretation of the Constitution pursuant to art 160(1) of the Constitution. If s 30 is applicable to the interpretation of art 150(3) of the Constitution, then the objection raised by the defence will immediately crumble as the previous operation of Ordinance No 22 will be preserved by virtue of s 30 notwithstanding its annulment.

In attempting to resolve this issue, I find it necessary to first consider the distinction between perpetual and temporary statutes and the common law position with regard to the application of s 30 to them.

A legislation is perpetual when no time is fixed for its duration (see *Jotindranath v Province of Bihar* AIR 1949 FC 175). It does not mean that such a statute cannot be repealed. It is perpetual in the sense that it does not cease to have effect by efflux of time (see *Hebbert v Purchas* (1871) LR

A 3 PC 605). A statute is temporary when its duration is only for a specified time (see *Jotindranath v Province of Bihar* AIR 1949 FC 175). It is now appropriate to consider the status of Ordinance No 22. Article 150(3) of the Constitution provides, inter alia, that an ordinance made under art 150(2B) of the Constitution shall cease to have effect if resolutions are passed by both Houses annulling such ordinance. Clause (7) reads as follows:

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> At the expiration of a period of six months beginning with the date on which a Proclamation of Emergency ceases to be in force, any Ordinance promulgated in pursuance of the Proclamation and, to the extent that it could not have been validly made but for this article, any law made while the Proclamation was in force, shall cease to have effect, except as to things done or omitted to be done before the expiration of that period.

C

As a time period has been prescribed for the expiry of an ordinance made under art 150(2B) of the Constitution such an ordinance, like Ordinance No 22, is a temporary legislation. A critical distinction in common law between temporary and perpetual statutes is that s 30, which is limited in its operation to repeals, has no application when a temporary statute expires (see *Wicks v Director of Public Prosecutions* [1947] 1 All ER 205; *State of UP v Jagmanderdas* AIR 1954 SC 683; *Gopichand v Delhi Administration* AIR 1959 SC 609 and *State of Orissa v Bhupendra Kumar* AIR 1962 SC 945).

D

The resultant issue that arises for determination is whether legal proceedings can be continued or initiated after a temporary statute has expired. This would depend on the construction of the statute as a whole. Normally, a temporary statute contains a saving provision similar to s 30. In the absence of such a provision, the general rule is that a proceeding taken against a person under a temporary statute terminates as soon as the statute expires. This is lucidly explained by the Court of Criminal Appeal in *R v Wicks* [1946] 2 All ER 529 where Lord Goddard CJ said (at pp 531–532):

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> Considering the position, first, at common law as to the expiration or repeal of a statute, in our opinion, the position may be taken as now settled. The leading authority is *Steavenson v Oliver* (1841) 8 M & W 234. In that case, Parke B said (at p 241):
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> > 'There is a difference between temporary statutes and statutes which are repealed; the latter (except so far as they relate to transactions already completed under them) become as if they had never existed; but with respect to the former, the extent of the restrictions imposed, and the duration of the provisions, are matters of contribution.'
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> That passage was considered and approved by Roche J in *Spencer v Hooton* (1920) 37 TLR 280, and, in our opinion, is a correct statement of the law. It is worth observing that in *Steavenson v Oliver* (1841) 8 M & W 234, there are dicta both by the Chief Baron and by Alderson B which go further, and appear to say that in any case where a man offends against a temporary statute he can be convicted and punished after its expiration, but, in our opinion, this is contrary to the older cases which were not cited to the judges, in particular *Miller*'s case (1764) 1 Wm Bl 451 and *R v McKenzie* (1820) Russ & Ry 429. At the present day, it is most unlikely that any question of this nature will arise where an Act has been repealed because the position is sufficiently dealt with by the Interpretation Act 1889 s 38(2)(c) and (d), which provides that the

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> repeal of an Act passed after the commencement of that Act shall not, unless the contrary intention appears, affect any liability incurred or affect any penalty or punishment incurred in respect of any offence committed against any enactment so repealed, and the section goes on to provide that any legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed. This section, however, has no application to statutes which have expired, and the question must, therefore, remain one of construction whether the provision as to expiry are such as to make it impossible for a prosecution or other proceeding to be either instituted or brought to conviction, or whether, on a true construction of the Act, Parliament has provided that legal proceedings, whether of a civil or criminal character, can be prosecuted in relation to matters connected with the Act after it has expired.

It is significant to remember that the common law that I have adverted to is applicable only when a temporary statute expires. However, what I have discussed thusfar is now academic as s 16(2) of the United Kingdom Interpretation Act 1978 provides that the general savings which by statue applied to a repeal would also extend to an expired statute. A similar provision is contained in s 32 which reads as follows:

> Sections 28, 29, 30 and 31 shall apply on the expiry of a written law as they would have applied if that law had been repealed.

It is therefore clear that s 30 would apply to a statute which has expired. It follows that s 30 would apply to Ordinance No 22 when it expires as prescribed. However, the case at bar is not concerned with the result of a statute when it expires but its effect when it ceases to have effect before its expiry date. It has been held that where a statute is repealed before its expiry, s 30 would apply (see *State of Punjab v Mohar Singh* AIR 1955 SC 84). Thus the position is the same even when a statute ceases to have effect before its expiry date. This rule, however, would become applicable to Ordinance No 22 only if its manner of ceasing to have effect, that is to say, by way of an annulment, can be said to be equivalent to it being repealed.

That brings into focus whether the annulment of a statute, as in the case of Ordinance No 22, amounts to a repeal of it. The words 'annul' and 'repeal' are defined in *Black's Law Dictionary* (6th Ed) as follows:

> *Annul*
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> To reduce to nothing; annihilate; obliterate; to make void or of no effect; to nullify; to abolish; to do away with. To cancel; destroy; abrogate.
>
> *Repeal*
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> The abrogation or annulling of a previously existing law by the enactment of a subsequent statute which declares that the former law shall be revoked and abrogated (which is called 'express' repeal), or which contains provisionary so contrary to or irreconcilable with those of the earlier law that only one of the two statutes can stand in force (called 'implied' repeal). To revoke, abolish, annul, to rescind or abrogate by authority.

It will therefore be observed that the meanings of annul and repeal are clearly the same as both seek to abrogate a statute. They amount to the use

of different words to achieve the same result. As Francis Bennion says in his book entitled *Statutory Interpretation* (2nd Ed) at p 201:

> The law has made use of many synonyms for the operation known as repeal, often in the same sentence.

Accordingly, the word 'repeal' has been properly defined in s 3 of the Interpretation Acts 1948 and 1967 as:

> ... includes rescind, revoke, cancel and replace.

The use of the word 'includes' in the definition of 'repeal' shows that the definition provided is not exhaustive and thus includes the annulment of a statute as it has the same effect as the other words included in the meaning of 'repeal' to which I have just referred. In the premises, it is my view that the annulment of a statute is the repeal of it. The required resolutions passed by both Houses of Parliament to annul Ordinance No 22 as provided by art 150(3) of the Constitution would therefore constitute the repealing law for the purposes of s 30. The corollary is that s 30 would apply to Ordinance No 22 once it is effectively annulled. I pause to refer to the defence submission that the words '... as if the repealing law had not been made' in s 30 means that there must be a repeal of one legislation by another and that the absence of a repealing law in the case of an annulment renders s 30 inapplicable. In my opinion, this argument cannot be sustained in the light of s 32 which extends s 30 to a law that has expired. In the case of a law that has expired, there is no repealing law. Section 32 read with s 30 means that the effect of expiry of a statute is the same as if it had been repealed by another statute.

The next issue that arises for consideration is whether the saving provision contained in art 150(3) of the Constitution excludes the application of s 30 to it. This saving provision must be contrasted with the one in *Wicks v Director of Public Prosecutions* [1947] AC 362 which reads as follows:

> The expiry of this Act [Emergency Powers (Defence) Act 1939] shall not affect the operation thereof as respects things previously done or omitted to be done.

It must be observed that the English provision is widely worded. Thus, the words 'previously done' which are not qualified in any way were held to refer to prosecutions instituted. In the case of the saving provision in art 150(3) of the Constitution, the same words are qualified by the words '... by virtue of ...' which as contended by the defence means '... on the strength of ...'. The saving provision, therefore, refers to anything previously done on the strength of Ordinance No 22. Clearly, the words used cannot refer to the commission of an offence as no offence can be committed on the strength of a statute. It also cannot refer to the institution of a prosecution as no prosecution can be instituted on the strength of Ordinance No 22 but by virtue of art 145(3) of the Constitution read with s 376 of the Criminal Procedure Code. In my opinion, therefore, the saving provision does not deal with prosecutions. It has been held that where a

statute is repealed with a proviso 'except as to things done under it' the provision is designed to safeguard the validity of orders, appointments, etc issued under the repealed statute (see *Basant Singh v Rampal Singh* AIR 1919 Oudh 217; *Ram Prasad v State of Punjab* AIR 1966 SC 1607). The proviso in the Indian cases that I have just referred to is the same as the proviso in art 150(3) of the Constitution as the word '... under ...' in the former has the same effect as the words '... by virtue of ...' in the latter. It must also be remembered that the saving provision in art 150(3) of the Constitution is a general provision designed to apply generally, wherever possible, to all ordinances promulgated under art 150(2B) of the Constitution. It is thus my view that the saving provision deals with notifications, directions or appointments made under a particular ordinance so as not to invalidate such acts upon the annulment of the ordinance concerned. In any event, this provision is a special saving provision meant to supplement s 30 and does not affect the general applicability of that section. In this regard, Francis Bennion in his book entitled *Statutory Interpretation* (2nd Ed) in commenting on the United Kingdom Interpretation Act 1978 s 16(1), equivalent to s 30, says (at p 207):

> *Special savings.* The general savings given here are often supplemented by special provisions in the repealing Act itself. Occasionally, such special provisions may entirely displace these general savings.

The language employed in the saving provision is not so worded as to displace s 30. It merely emphasises what is provided by s 30(1)(a) without in any way curtailing the other parts of s 30.

It is therefore my view that the annulment of Ordinance No 22 will not take away the right of the Public Prosecutor to institute a prosecution even after its annulment. In the premises, I dismissed the objection raised by the defence and proceeded with the trial.

Preliminary objection dismissed.

Reported by Andrew Chirstopher Simon